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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 269

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, COLUMBIA GAS & ELECTRIC CORPORATION, COLUMBIA OIL & GASOLINE CORPORATION, GEORGE H. HOWARD, PHILIP G. GOSSLER, CHARLES A. MUNROE, THOMAS R. WEYMOUTH, THOMAS B. GREGORY, EDWARD REYNOLDS, JR., BURT R. BAY and JOHN H. HILLMAN, JR.,
Appellees.

BRIEF OF APPELLEE COLUMBIA GAS & ELECTRIC CORPORATION

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TABLE OF CONTENTS

TABLE OF CASES CITED

PAGE

TABLE OF STATUTES CITED

TABLE OF AUTHORITIES CITED

Blank Page

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No. 269

BRIEF OF APPELLEE COLUMBIA GAS & ELECTRIC CORPORATION

NATURE OF THE PROCEEDING

This is an appeal from an order (R. 565) entered by the United States District Court for the District of Delaware on April 23, 1940, granting motions by appellees Columbia Gas & Electric Corporation (hereinafter referred to as Columbia Gas) and Columbia Oil & Gasoline Corporation (hereinafter referred to as Columbia Oil) to dismiss appellant's application to intervene in a civil anti-trust suit brought by the United States against appellees Columbia Gas, Columbia Oil and others. The motions to dismiss the application (R. 426, 514) were made upon the sole grounds

that the application was not properly authorized by the appellant, Panhandle Eastern Pipe Line Company (hereinafter referred to as Panhandle Eastern), and that the attorneys who filed the application were not authorized by Panhandle Eastern to represent it.

The District Court granted the motions upon these grounds. Its opinion (R. 520) is reported in 32 Fed. Supp. 474.

Jurisdiction of this Court is invoked by appellant under the Expediting Act of 1903 (Act Feb. 11, 1903, c. 544, 32 Stat. 823, as am.; 15 U. S. C. §§ 28 and 29).

QUESTIONS PRESENTED

The questions presented on this appeal are:

(1) whether the application to intervene in the anti-trust suit was properly authorized by Panhandle Eastern; and

(2) whether the attorneys, whose names appear on the application as attorneys for Panhandle Eastern, were authorized by that Company to act in its behalf in filing the application.

STATEMENT OF THE CASE*

This cause, in which the application to intervene was filed, was a civil anti-trust suit brought by the United States

*This statement of facts is limited to those portions of the Record necessary for the consideration of the narrow questions presented by this appeal. A more detailed statement of certain aspects of the government anti-trust suit, not here essential, is contained in the Statement of the Case in our brief on the appeal of Missouri-Kansas Pipe Line Company from the order of the same District Court denying it the right to intervene; Case No. 268 this term. The Record in that case and this has been consolidated and printed in the same volume.

in the District Court for the District of Delaware against Columbia Gas, Columbia Oil and various individuals, alleging violation of the anti-trust laws by the defendants in connection with the acquisition and ownership by Columbia Oil of a controlling interest in the securities of Panhandle Eastern. The Government's bill of complaint appears in the Record at pages 10-109. No trial was had of the allegations, which were denied by defendants in their answers (R. 109-138), because a Consent Decree (R. 142-149) was entered on January 29, 1936, in which all parties stipulated that the defendants maintained the truth of their answers and did not admit any wrongdoing, but were willing to enter into the Consent Decree to avoid the expense and disturbance of litigation (R. 138-142). One of the provisions of the Decree was that Columbia Oil might retain its stock in Panhandle Eastern (R. 145), but that this stock should be placed in the hands of a Trustee named in the Decree (R. 146), with power to vote the stock for purposes not inconsistent with the Decree and to elect as directors nominees recommended by Columbia Oil, of which the Trustee should be one, but with the power to remove such directors and to replace them with others of his own choosing if in his judgment such action should be necessary in the interests of Panhandle Eastern or to effectuate the purposes of the Decree (R. 146-147). Columbia Oil has been, since the entry of the Decree, the owner of sufficient shares of Panhandle Eastern to be thus permitted to recommend to the Trustee for election six out of nine directors of Panhandle Eastern (R. 378). The Trustee named in the Decree, Mr. Gano Dunn, has continued in office since his appointment from the date of the Decree down to the present date and has voted the stock pursuant to the directions of the

Decree; extracts from his semi-annual reports filed with the Court in pursuance of the Decree are part of the Record (R. 149-274). The Decree also provided that Panhandle Eastern, upon proper application, might become a party to the proceeding for the limited purpose of invoking certain relief to protect it against infractions of the anti-trust laws (R. 149).

Since January, 1939, various further proceedings have been had in the anti-trust suit, not relevant to the questions presented upon this appeal, and there have been three separate attempts by Missouri-Kansas Pipe Line Company (hereinafter referred to as Mokan), a large minority stockholder of Panhandle Eastern, dated respectively, February 6, 1939 (R. 283), July 5, 1939 (R. 362) and April 16, 1940 (R. 526), to intervene in the proceeding, all of which have been denied by the District Court (R. 321, 371 and 541). Appeals from the first two of these attempts to intervene were taken to the Circuit Court of Appeals for the Third Circuit but were dismissed by that Court for lack of jurisdiction in view of the Expediting Act (15 U. S. C. §§ 28, 29); its opinion is reported in *Missouri-Kansas Pipe Line Company* v. *United States et al.*, 108 F. (2d) 614. Certiorari thereupon was denied by this Court: *Missouri-Kansas Pipe Line Company* v. *United States et al.*, 309 U. S. 687. An appeal from the denial by the District Court of the third and most recent petition of Mokan to intervene dated April 16, 1940, is now pending at this term in this Court in Case No. 268.

The present proceeding represents another effort on the part of Mokan to become a party to the anti-trust proceeding. The allegations of the present application and the relief asked therein are identical in every substantial respect

with the allegations of and relief asked in Mokan's application to intervene dated April 16, 1940, which it filed as a stockholder of Panhandle Eastern, in behalf of Panhandle Eastern (R. 526), and from the order dismissing which (R. 541-542) an appeal is pending in this Court as Case No. 268, this term.

This time, however, the attorneys who represented Mokan in its latest attempt to intervene assert that they are now representing Panhandle Eastern, and that that corporation is seeking in its own right to intervene in the anti-trust case. The present application, filed on March 23, 1940 (R. 412) was signed with the name of Panhandle Eastern "by Arthur G. Logan" (R. 424), and also by two other attorneys, all of whom represent Mokan in its most recent application to intervene (R. 540). No director or officer of Panhandle Eastern signed the application, and Mr. Creveling, President of Panhandle Eastern, in his affidavit (R. 427) filed with appellees' motions to dismiss, repudiated as unauthorized the action of these attorneys in filing the application in the name of Panhandle Eastern. The basis alleged for the authority of these attorneys to so represent Panhandle Eastern is action which they assert was taken at the meeting of the stockholders of Panhandle Eastern held on March 11, 1940. It will thereupon be necessary to review briefly the proceedings which took place at the meeting.

After a few preliminaries Mr. Logan, the owner of 10 shares of common stock (which were being voted by proxy) (R. 448), and who is one of the attorneys prosecuting this appeal, moved that Mr. Dixon, a proxy for Mokan, be made chairman of the meeting. The Chairman of the meeting, Mr. Creveling, President of Panhandle Eastern, ruled the motion out of order (R. 432) upon the ground that the

by-laws provide that the President of the corporation shall preside at meetings of stockholders (R. 433) and that the by-laws may be amended only if notice of the proposed amendment be contained in the notice of the meeting (R. 434). Mr. Logan thereupon took an appeal from the ruling to the floor for a vote by shares (R. 432) and asserted that Mr. Gano Dunn, the Trustee appointed under the Consent Decree to hold and vote the shares of Panhandle Eastern owned by Columbia Oil, could not vote these shares unless he should exhibit specific instruction from Columbia Oil as to how he should vote on the motion (R. 432). Mr. Dunn voted to support the chair (R. 434). Mr. Logan's appeal to disqualify Mr. Dunn's vote was disallowed by the chair (R. 435) and the Chairman, after some difficulty (R. 435-436), proceeded with the meeting.

The specific ground upon which Mr. Dunn's vote was challenged was that under Article III of the Consent Decree, in sub-paragraph (b) thereof (R. 147), it is provided that Mr. Dunn shall vote the Panhandle Eastern stock, owned by Columbia Oil, of which he is Trustee, upon all matters and questions, other than election of directors, on which the stock is entitled to vote

> "as directed by the beneficial owners thereof, except when such directions are inconsistent with the purposes of this decree"

and that therefore Mr. Dunn was not entitled to vote upon any question unless he should exhibit specific instructions from Columbia Oil, the beneficial owner, directing him how to vote upon that question (R. 432-3). At one point a general motion was made by Mr. Logan that the corporation refuse to accept any vote of Mr. Dunn on any question un-

less Mr. Dunn should first state that he had been directed by Columbia Oil to vote as he did (R. 446), which motion was ruled out of order (R. 446).

The same procedure continued throughout the meeting, the representatives of Mokan presenting numerous motions or objecting to various other motions and claiming as to each one that Mr. Dunn was not entitled to vote thereon unless specifically instructed as to his vote by Columbia Oil and the chair in each case overruling the claim so made and receiving Mr. Dunn's vote. Thus there was unsuccessfully challenged Mr. Dunn's vote on a resolution appointing two persons to act as judges of the election (R. 436); and approving the minutes of the previous annual meeting (R. 443); and on resolutions by the Mokan representatives that the by-laws be amended to increase the Board of Directors from nine to fourteen persons (R. 451); and to refuse to recognize the right of the B Preferred Stock to vote for directors (R. 453-4); and that the by-laws be amended to provide that the officers should be chosen and their salaries fixed by the stockholders (R. 459); and that there be elected as officers of Panhandle Eastern certain officers of Mokan (R. 460).

Directors were elected for the ensuing year (R. 457-9), the Mokan representatives insisting that the additional directors, provided for in their resolution to amend the by-laws by increasing the number of directors to fourteen, had been elected (R. 458) and objecting to the election of two directors by the Class B Preferred Stock held by Mr. Dunn as Trustee (R. 458).

Thereafter Mr. Hand, a proxy holder for Mokan, moved that Panhandle Eastern should bring various lawsuits, including suits against Columbia Oil (R. 461). One

of the suits urged was intervention in the present anti-trust suit (R. 423), and it is pursuant to this resolution that the attorneys claim to bring the application which is involved in this appeal. The resolution provided for the employment by Panhandle Eastern of the specified attorneys, who now prosecute this appeal, to represent it in this proposed litigation, and provided that these attorneys should be paid "a reasonable compensation". The resolution did not name Mr. Dunn as one of the defendants against whom relief should be asked in the proceeding for intervention. The statement of appellant's brief (page 26 thereof) that the resolution to authorize this intervention "proposed an action against Gano Dunn, as trustee" is not correct and cannot be supported by the Record; the action contemplated by the proposed intervention application was described by its proponents to the stockholders' meeting only as an action against Columbia Oil (R. 462). This resolution was defeated by the majority vote cast by Mr. Dunn (R. 462-3) and the same objection as above was made to Mr. Dunn's vote (R. 462), and also the additional objection that, as the resolution called for lawsuits against Columbia Oil, if Mr. Dunn were voting pursuant to Columbia Oil's instructions, then his vote should not be received, and if he were not so voting, then he was not entitled to vote (R. 462).

A motion to adjourn was finally made and carried (R. 480). Mr. Logan, however, and his supporters, refused to recognize the validity of such adjournment (R. 481) and proceeded to hold a stockholders' meeting of their own after the representatives of the majority stockholders had left the room (R. 481-7). At this meeting of minority stockholders, all the resolutions which they had introduced at

the regular meeting were proposed and adopted by those present (R. 481-7). In addition, the meeting purported to elect five additional directors of the Corporation, pursuant to the above-described resolution which had been introduced to increase the membership of the Board of Directors from nine to fourteen and which had been voted down at the regular meeting (R. 483, 484). The result of this proceeding if successful would be to give the Mokan minority stockholding a majority of the membership of the Board of Directors.

Thereafter, on March 23, 1940, the present application (R. 412) was filed by the attorneys who had been so named in the resolution of employment which had been voted down by the majority stock, said application being filed in the name of Panhandle Eastern, asking leave to intervene in the Government anti-trust suit. On March 29, 1940, appellees Columbia Gas (R. 426) and Columbia Oil (R. 514) filed motions to dismiss the application upon the grounds that it was not signed or verified by Panhandle Eastern and that the attorneys whose names appeared on it were not attorneys for Panhandle Eastern nor authorized by Panhandle Eastern to act in its behalf. From the affidavits and exhibits attached to these motions it appeared that the notice of the stockholders' meeting contained no mention of any of the matters with respect to enlarging the board of directors, or having officers elected by stockholders, or intervening in lawsuits and bringing other suits, such as were presented at the meeting by the attorneys now purporting to represent Panhandle Eastern (R. 500); that prior to the meeting the Columbia Oil Board of Directors had (R. 503-509) approved instructions given to Mr. Dunn by Mr. Wilson, Vice-President of Columbia Oil,

directing Mr. Dunn how to vote upon a certain specific matter immaterial to the issues in this proceeding and directing further

> "* * * that as to all other matters except directors, which might come before said meeting he [Mr. Wilson] had directed Mr. Dunn to vote said shares as, in his discretion, seemed best for the interest of Panhandle and generally to support the management; * * *."

and that following the Panhandle Eastern stockholders' meeting, at a meeting of the Board of Directors of Columbia Oil, a resolution was adopted approving and ratifying all of the votes of Mr. Dunn at that stockholders' meeting (R. 510).

On April 23, 1940, the District Court entered its order (R. 565), having previously filed its opinion (R. 520), granting the motions to dismiss the intervention application on the grounds (R. 525-526) (a) that the application was not authorized by Panhandle Eastern, (b) that the attorneys whose names appear on the application were not authorized by Panhandle Eastern to act in its behalf; and (c) that Mr. Dunn duly voted the Panhandle Eastern stock held by him, as Trustee, on all matters on which he voted at the Panhandle Eastern meeting, in accordance with the provisions of the Consent Decree and pursuant to valid directions from Columbia Oil.

Following this stockholders' meeting of Panhandle Eastern the Mokan attorneys in addition brought a proceeding pursuant to Section 31 of the Delaware Corporation Law (printed as Appendix C to this brief), signed by Mr. Logan as attorney for Mokan, in Mokan's name in the Chancery Court of the State of Dela-

ware to review the election of directors and officers of Panhandle Eastern at the above-described stockholders' meeting and determine who were the duly elected directors and officers (R. 510). This chancery proceeding was filed on March 13, 1940 (R. 510), prior to the filing of the instant application in the name of Panhandle, and named as parties Panhandle Eastern and certain of its directors and officers whose election was contested. Although nothing further appears in the record with respect to this proceeding,* the Chancellor on June 19, 1940, entered his order in that proceeding overruling all the contentions of Mokan, and holding that the directors elected by the vote of Mr. Dunn had been properly elected; that the officers of the Corporation were those persons chosen by the directors; that none of the additional directors purported to have been elected by Mokan pursuant to their claimed amendment of the by-laws had been properly elected; that none of the persons purported to have been elected officers by Mokan at the stockholders' meeting had been elected officers; and that the purported amendment of the by-laws with respect to the number and election of directors and officers was void and the by-laws had not been modified in any respect. This decree

*While the ordinary rule is that an appellate Federal court will not take judicial notice of the records of proceedings in other courts, nevertheless there is an exception to this rule in the case of developments in proceedings in other courts, including a State Court, having an important bearing upon an appeal pending in the Federal appellate court, and which take place during the pendency of the appeal in the Federal court so that they could not have been made part of the record; *Ransom* v. *Pierre*, 101 Fed. 665 (C. C. A. 8th, 1900); *Hennessy* v. *Tacoma Smelting & Refining Co.*, 129 Fed. 40 (C. C. A. 9th, 1904); *United States* v. *Commercial Credit Co.*, 20 F. (2d) 519 (C. C. A. 4th, 1927); *Mutual Life Insurance Co. of New York* v. *Lipp*, 28 F. (2d) 863 (C. C. A. 9th, 1928).

of the Chancellor is printed in full in Appendix A of this brief. In lieu of filing an opinion in that proceeding, and prior to the entry of his decree, the Chancellor addressed a letter to the various counsel in the case, dated June 11, 1940, announcing his decision in advance, in order that there might be no unnecessary delay in settling the important question as to who constituted the proper management of Panhandle Eastern. A copy of this letter is printed in full in this brief as Appendix B.

Thus the situation now presented is this: the properly elected directors of Panhandle Eastern have been determined by the Delaware Chancellor in the exercise of the jurisdiction given to him under Section 31 of the Delaware Corporation Law. These directors have never authorized the making by Panhandle of any application to intervene in this anti-trust proceeding, nor have they ever employed the attorneys now prosecuting it for this purpose. Yet, the application which was dismissed in the order here appealed from was signed with the name of Panhandle Eastern by these attorneys. The question presented on this appeal is therefore whether the instant application to intervene could be brought by these attorneys, in the absence of any authority to that end.

SUMMARY OF ARGUMENT

POINT I—The Question of the Authority of the Attorneys in This Proceeding to Represent Panhandle Eastern Was Properly Presented by Motion to Dismiss Their Application Filed on Behalf of Panhandle Eastern; and the District Court Acted Properly in Disposing of the Application Upon This Motion to Dismiss Prior to Any Hearing Upon the Merits.

POINT II—Legal Proceedings by a Corporation Must Be Instituted and Controlled by Its Directors and Cannot Be Begun by Stockholders Against the Will of the Directors, Except by a Stockholders' Derivative Action Alleging Abuse of Their Powers by the Directors. The Present Proceeding Was Filed Without Authority from the Board of Directors of Panhandle Eastern, and, Not Being a Stockholders' Derivative Action, Was Properly Dismissed.

POINT III—Even if the Stockholders Could Authorize the Filing of This Application as an Act of the Corporation, They Did Not Do So, Since the Vote of Dunn in Opposition Thereto Was Valid.

POINT IV—If the Stockholders Now Purporting to Speak for Panhandle Eastern Felt that They Were Unjustly Treated by the Defeat of Their Resolution to Apply for Intervention in This Cause, Their Proper Course Was to File a Derivative Stockholders' Action in Behalf of Panhandle Eastern Asking that it Be Allowed to Intervene, and Not to Attempt to Seize Control of that Corporation and Act in its Name Without Authority from its Board of Directors.

ARGUMENT

POINT I

THE QUESTION OF THE AUTHORITY OF THE ATTORNEYS IN THIS PROCEEDING TO REPRESENT PANHANDLE EASTERN WAS PROPERLY PRESENTED BY MOTION TO DISMISS THEIR APPLICATION FILED ON BEHALF OF PANHANDLE EASTERN; AND THE DISTRICT COURT ACTED PROPERLY IN DISPOSING OF THE APPLICATION UPON THIS MOTION TO DISMISS PRIOR TO ANY HEARING UPON THE MERITS.

The authority of an attorney to bring proceedings on behalf of a client may be challenged at any time during the course of the proceedings, and, where a pleading is filed by such attorney, the question of his authority may properly be raised by motion to dismiss the pleading upon that ground. Such is the holding of *The Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315 (1927). In that case a bill had been filed on behalf of an Indian Pueblo to enjoin respondents, the Secretary of the Interior and the Commissioner of the General Land Office, from offering for sale certain Indian lands from among the public lands of the United States. In their answer, respondents alleged, among other things, that the Pueblo had never authorized the attorneys to bring the suit, and filed also a motion to dismiss, supported by affidavits (precisely as has been done in the instant case), upon that ground. After a hearing upon the motion, the District Court postponed its decision until the final hearing and proceeded to take testimony both upon the issue of the authorization of the attorneys to bring the suit and upon the other issues raised by the answer going to the merits. The District

Court held that the inhabitants of the Pueblo had not authorized the attorneys to bring the suit, but entered a decree dismissing the bill upon the merits. On appeal the Court of Appeals affirmed the decree on the merits. The United States Supreme Court, upon further appeal, held that both lower courts were in error in dismissing the bill on the merits, and held that the bill should have been dismissed for lack of authority in the attorneys to bring it but without prejudice to the bringing of any other suit with proper authority of the Pueblo. This Court said at pages 319, 321 of its opinion:

> "Whether, as a matter of practice, the challenge to the authority of counsel was seasonably interposed, it is not important to decide, for in any event, the trial court, or this court, has power, at any stage of the case, to require an attorney, one of its officers, to show his authority to appear. In *The King of Spain* v. *Oliver,* 2 Wash. C. C. 429, 430, Mr. Justice Washington, sitting in the circuit court, said: '* * * it would be strange, if a Court whose right and whose duty it is to superintend the conduct of its officers, should not have the power to inquire by what authority an attorney of that Court undertakes to sue or to defend, in the name of another—whether that other is a real or fictitious person—and whether its process is used for the purpose of vexation or fraud, instead of that for which alone it is intended. The only question can be, as to the time and manner of calling for the authority, and as to the remedy, which are in the discretion of the Court, and ought to be adapted to the case.' See also, *W. A. Gage & Co.* v. *Bell,* 124 Fed. 371, 380; *McKiernan et al.* v. *Patrick et al.,* 4 How. (Miss.) 333, 335; *Clark* v. *Willett,* 35 Cal. 534, 539-541; *Miller* v. *Assurance Co.,* 233 Mo. 91, 99; *Munhall* v. *Mitchell,* 178 Mo.

App. 494, 501; *S. F. Savings Union* v. *Long,* 123 Cal. 107, 113.

* * * * * * * *

"We agree with the conclusions of the court of first instance, but are of opinion that the dismissal should have been not upon the merits, but without prejudice to a suit if properly brought. The decrees of both courts, therefore, are erroneous, and the cause must be remanded to the court of first instance with directions to dismiss the bill, on the ground that the suit was brought by counsel without authority, but without prejudice to the bringing of any other suit hereafter by and with the authority of the alleged Pueblo of Santa Rosa."

Thus, the *Pueblo* case not only establishes the propriety of the motion to dismiss for lack of authority to bring the action, made in the instant case by defendants-appellees below, but in addition holds that the time and manner of inquiring into the authority of the attorneys to bring the action are within the discretion of the lower court. The appellants' brief is in error in saying (p. 28 thereof) that the filing of this motion without accompanying denial of the allegations of the complaint as to violations of the anti-trust laws constituted an admission by defendants of such allegations. It no more constituted such an admission than would by itself a motion to dismiss based on insufficiency of service of process or improper venue. Rule 8(d) of the Rules of Civil Procedure upon which the Mokan attorneys rely (their brief p. 28) is inapplicable, because by its terms it applies only to a "responsive pleading". No such pleading has been filed here, the question of the authority of the Mokan attorneys having been raised by prelimi-

nary motion, the propriety of which has been established by this Court in the *Pueblo* case.

The *Pueblo* case has been relied on and followed in two recent decisions of Circuit Courts of Appeals, in both of which certiorari has been denied by this Court. In *McLean v. Burkinshaw,* 107 F. (2d) 665 (Ct. App. D. C. 1939), the Court of Appeals for the District of Columbia affirmed an order striking out an answer upon the ground that the attorney who had filed the answer had no authority to represent the defendant. The Court said at page 665 of its opinion:

> "The District Court may in its discretion, at any stage of a case, require an attorney to show his authority to appear. *Pueblo of Santa Rosa* v. *Fall,* 273 U. S. 315, 47 S. Ct. 361, 71 L. Ed. 658; *Alamo* v. *Del Rosario,* 69 App. D. C. 47, 98 F. 2d 328."

Certiorari was denied by this Court in 309 U. S. 670 (1940).

Similarly, the Circuit Court of Appeals for the Second Circuit in *Sutherland* v. *International Insurance Co.,* 43 F. (2d) 969 (C. C. A. 2nd, 1930), granted a motion by the defendant to dismiss a bill filed by the Alien Property Custodian on the ground that an attorney in private practice had no authority to represent him. The Court expressly relied on the *Pueblo* case. Certiorari was denied by this Court in 282 U. S. 890 (1930).

These authorities sustain the propriety of the method of procedure of the District Court in the instant case. Accordingly, we now pass to a consideration of whether that Court was correct in holding that the attorneys purporting to represent Panhandle Eastern in the application had no authority to represent it.

POINT II

LEGAL PROCEEDINGS BY A CORPORATION MUST BE INSTITUTED AND CONTROLLED BY ITS DIRECTORS AND CANNOT BE BEGUN BY STOCKHOLDERS AGAINST THE WILL OF THE DIRECTORS, EXCEPT BY A STOCKHOLDERS' DERIVATIVE ACTION ALLEGING ABUSE OF THEIR POWERS BY THE DIRECTORS. THE PRESENT PROCEEDING WAS FILED WITHOUT AUTHORITY FROM THE BOARD OF DIRECTORS OF PANHANDLE EASTERN, AND, NOT BEING A STOCKHOLDERS' DERIVATIVE ACTION, WAS PROPERLY DISMISSED.

It is well settled that the directors of a corporation are the only persons who can institute an action on behalf of and in the name of the corporation. This is because the decision whether or not to institute litigation is one that has been confided in the first instance to their discretion in managing the corporation.

Stockholders, of course, are not remediless, because if, after a request by a stockholder to the directors that they institute an action, the directors improperly refuse to do so, the stockholder may, upon proper showing, bring a derivative action in his own name for the benefit of the corporation. Indeed, in the controversy represented by the instant case, Mokan has brought two such derivative actions on behalf of Panhandle Eastern, seeking leave in the right of Panhandle Eastern to intervene in this Government antitrust action. The first was its intervention application of February 6, 1939 (R. 283), which was denied by the District Court (R. 321). The next was its petition of April 16, 1940 (R. 526), which was also denied by the District Court (R. 541), and an appeal from which denial is at present

before this Court concurrently with this appeal, in case No. 268.

The above rule, that the determination as to whether to bring litigation in the name of a corporation is confided to its directors, has been repeatedly stated by text writers. Thus in 5 Fletcher, Private Corporations (Perm. Ed.) § 2104 at page 361, it is said:

> "The control of litigation and the decision to litigate or not is in the directors, and until they improperly fail or refuse to sue or defend in the corporate name, the stockholder cannot do so, and then must sue in right of the corporation in equity, making a case of wrongful refusal by the directors to sue."

And in Spellman, Corporate Directors, § 145 at page 394, it is said:

> "The board of directors has the power to institute, prosecute, and defend suits brought by or against the corporation. The wisdom and expediency of bringing suit, or refusing to sue, is a matter for the determination of the board; and, unless fraud on the part of its members is proved, its decision will not be interfered with and no one else may sue in the corporate name."

And in 4 Cook, Corporations (8th ed. 1923), §750 at pages 3297-99, it is said:

> "It frequently happens that the corporation has a cause of action against a third party which the directors think best not to press, or that the corporation is sued and the directors think best not to defend, or, where an action is pending, the directors decide to compromise the matter. The judgment of the

> directors may, in the opinion of a stockholder, be erroneous, and yet it cannot be controlled or changed by the stockholders except by refusing to re-elect the directors to office. The stockholder cannot go into court and attempt to change the policy of the directors in the management of the suit. A stockholder cannot control the discretion of directors as to whether to bring a suit or not."

The decided cases fully support the above statements of the text writers.

Thus, in *Railway Co.* v. *Alling*, 99 U. S. 463 (1878), the directors of one corporation brought an action against another corporation. After an unfavorable decision in the trial court, an appeal was taken by the plaintiff to this Court. During the pendency of the appeal, certain persons who did not want the litigation to proceed acquired the majority of the stock of the appellant corporation. The board of directors, however, was desirous of continuing the litigation and pressing the appeal. The new majority stockholders moved the Court to dismiss the appeal for the reason that the stockholders of the corporation no longer wished to prosecute it. This Court, however, denied the motions and heard the appeal on its merits, stating at page 472 of the opinion:

> "The present appeals are being prosecuted to final judgment by order of the directors or trustees of the appellant corporation. To them, by law, is committed the management of the property and concerns of the corporation. In all litigation involving the action of the corporation they are its representatives in court. In the discharge of their duties they represent not only the stockholders, but the bondholders and creditors, of the company.

> Their right, while in the exercise of their legitimate functions, to manage the affairs and suits of the company, ought not to be controlled or interfered with by this court, by reason of any thing which appears upon the pending motions. Upon their responsibility as directors and trustees they insist that these causes shall proceed to final judgment, in accordance with the stipulation heretofore made by the parties to the appeals. If, in prosecuting them to final judgment, they violate any trust committed to their hands, or any agreement which is binding upon the corporation and the minority stockholders, remedy may be sought in some court of original jurisdiction, into which, upon proper pleadings, all persons interested may be summoned."

And this Court in *Corbus* v. *Gold Mining Co.*, 187 U. S. 455 (1903) in affirming the dismissal of a stockholder's suit to restrain his corporation from paying a certain tax said (p. 463):

> "The directors represent all the stockholders and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a court of equity. The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right

> which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs."

The principle of the above cases has been recently followed in *Watts* v. *Vanderbilt,* 45 F. (2d) 968 (C. C. A. 2d, 1930), where, in a stockholder's derivative suit on behalf of a corporation, the bill alleging that there was no board of directors because the corporation had been dissolved, the Court said at page 969:

> "If the allegations that the board of directors has not functioned for the past five years and that there is no existing board of directors be sufficient to excuse a demand upon the directors, it would but emphasize the necessity of demanding action on the part of the shareholders. Under the New Jersey statutes (2 Comp. St. N. J. 1910, title 'Corporations,' p. 1629, § 46) three shareholders may call a meeting in the manner there provided. If there is no board of directors, as the bill alleges, an appeal to the shareholders to elect directors or other officers to conduct the litigation was a condition precedent to the plaintiffs' right to represent the corporation."

There is nothing in the law in Delaware, under the laws of which Panhandle Eastern is incorporated, which differs from the principles above set forth. Thus in *Sohland* v. *Baker,* 15 Del. Ch. 431 (1927), 141 Atl. 277, the Supreme Court of Delaware made it clear that for the purposes of bringing an action the directors were to be considered as the corporation, the Court saying (141 Atl. at p. 282), in sustaining a stockholder's derivative action to enforce a

right of the corporation against a third person whom the directors had refused to sue:

> "While the conclusion may be drawn that the corporate management was not hostile to action by the complainant, the fact, nevertheless, remains that the corporation itself refused to litigate an apparent corporate right.
>
> "The reasons for such refusal need not be considered. The corporation, having refused to institute proceedings, the only way that its rights could be brought before the court was by a bill filed by a stockholder. That the complainant, for the prevention of injustice, therefore, had the right to file the bill in the court below, seems clear."

The rule has also been stated by the Delaware Chancery Court in *McKee* v. *Rogers,* 18 Del. Ch. 81 (1931), 156 Atl. 191, where the Court said, with reference to a stockholder's derivative action to collect on a judgment previously obtained in favor of the corporation in another state against the defendant (156 Atl. at p. 193):

> "Of course a stockholder cannot be permitted as a general rule to invade the discretionary field committed to the judgment of the directors and sue in the corporation's behalf when the managing body refuses. This rule is a well settled one. But equally well settled is the exception to it, that a stockholder may sue in equity in his derivative right to assert a cause of action in behalf of the corporation, without prior demand upon the directors to sue, when it is apparent that a demand would be futile, that the officers are under an influence that sterilizes discretion and could not be proper persons to conduct the litigation."

And in *Ainscow* v. *Sanitary Co. of America,* 180 Atl. 614 (Del. Ch. 1935) a suit brought by a stockholder in the name of the corporation was dismissed because the stockholder showed neither authorization from the board of directors to bring the suit nor a demand upon the directors and their refusal. It is therefore clear that, under Delaware law, a stockholder cannot usurp the powers of the board of directors and institute litigation in the corporation's name, without authorization of the board. If he wishes to institute litigation against the will of the directors, it must be by a stockholder's derivative action making the usual allegations of demand upon the directors and their refusal.

It is also well settled in Delaware that, where a stockholder desires to bring a derivative action on behalf of the corporation to recover on an alleged cause of action owned by the corporation, an improper refusal by the directors to sue is sufficient to justify a derivative suit by the stockholder without further appeal to the stockholders; the courts of that State have so held in the *Sohland* and in the *McKee* cases just cited, as appears from the quotations from the opinions therein above given, and also in *Fleer* v. *Frank H. Fleer Corp.,* 14 Del. Ch. 277 (1924), 125 Atl. 411; *Miller* v. *Loft, Inc.,* 17 Del. Ch. 301 (1931), 153 Atl. 861.

Accordingly, it is clear that the present application in the name of Panhandle Eastern was filed without the authority of that corporation, because the filing was not authorized by its Board of Directors. To the proof offered by defendants (R. 427) that the filing of the intervention application had never been authorized by the Board of Directors, the attorneys purporting to represent appellant make no statement in contradiction and offer no proof of any such authority. Instead, their appeal purports to find

its authority to file the application, as stated in paragraph XX thereof, in a resolution allegedly adopted at a meeting of the stockholders of Panhandle Eastern (R. 423). But, under the authorities above cited, even if a majority of the stockholders as a body had voted in favor of the resolution, instead of only a minority as did vote, they could not have authorized the bringing of this application for leave to intervene, for the determination whether or not to bring this proceeding was within the discretion of the directors as the managing body of the corporation. It would be even more clear that the choice of certain named attorneys to conduct the litigation, and the payment of compensation to them, both of which were sought to be authorized by the stockholders' resolution relied on, are peculiarly matters within the discretion of the directors. The exercise of the directors' discretion in all these matters could only be challenged in the proper fashion by a stockholder bringing a derivative action on behalf of the Panhandle Eastern and alleging facts to show that the discretion of the directors in refusing to institute the litigation was improperly exercised. The present is not a proceeding of that nature.

POINT III

EVEN IF THE STOCKHOLDERS COULD AUTHORIZE THE FILING OF THIS APPLICATION AS AN ACT OF THE CORPORATION, THEY DID NOT DO SO, SINCE THE VOTE OF DUNN IN OPPOSITION THERETO WAS VALID.

Irrespective of the lack of power of the stockholders of Panhandle Eastern to authorize the filing of an intervention application as an act of their corporation, the fact is

that a majority of all stock validly cast its vote against the resolution that the corporation should intervene in this proceeding. The vote of Mr. Gano Dunn, the holder of record of more than a majority of the stock of Panhandle Eastern, in opposition to the resolution was validly cast.

Mr. Dunn's rights in voting the Panhandle stock held by him were governed by the provisions of the Consent Decree, Section III(b) of which empowered him to vote the stock, upon all questions other than the election of directors,

> "* * * as directed by the beneficial owners thereof, except when such directions are inconsistent with the purposes of this decree;" (R. 147).

The directions of the beneficial owner (Columbia Oil) were that on all matters, except a certain specific matter not here relevant and except the election of directors concerning which specific instructions were given him, Mr. Dunn should vote as, in his discretion, seemed best for the interests of Panhandle Eastern and, generally, to support the management (R. 503-9).

It is clear that all of the votes cast by Mr. Dunn at the stockholders' meeting on March 11, 1940, including the vote not to make the instant intervention application, were validly cast in compliance with this direction of Columbia Oil. The objection reiterated at the stockholders' meeting by the appellants against the reception of Mr. Dunn's vote was that he could not show specific authority from Columbia Oil to vote as he did. But there is nothing in the provisions of the Consent Decree which requires that the directions of the beneficial owner be specific with respect to the Trustee's vote on every matter coming up at a stock-

holders' meeting. It cannot be supposed that the Decree intended that Mr. Dunn's vote could not be counted on such a mechanical question as a motion to elect two persons as judges of election, in the absence of specific directions with respect thereto; nor can it be supposed that Mr. Dunn should not be permitted to cast his vote, in his discretion, against proposed amendments to the By-laws, of which no advance notice had been given to the stockholders. Similarly, specific instructions could not be required from the beneficial owner as to how Mr. Dunn should vote with respect to such resolutions concerning the institution of litigation as might be presented at the meeting, as to the nature of which the stockholders had no previous notice. Accordingly, as was the only feasible procedure, the beneficial owner, Columbia Oil, instructed Mr. Dunn that, on all matters except two which it specified, he should vote the shares held by him as Trustee as, in his discretion, seemed best for the interest of Panhandle Eastern and generally to support the management (R. 503). Pursuant to this general authority, Mr. Dunn voted against proceeding with the instant intervention application (R. 462). Subsequently, the Board of Directors of Columbia Oil ratified all the votes cast by Mr. Dunn at the meeting (R. 509-10).

The contention that Mr. Dunn was not entitled, under the Consent Decree, to vote as he did, because he did not have specific instructions from Columbia Oil, was presented to the Court below, wherein the Consent Decree was entered and which, pursuant thereto, had retained jurisdiction for the purpose of giving it full effect, and enforcing strict compliance with it. The Court construed the Decree contrary to such contentions, and in its opinion, handed down April 6, 1940, held (R. 525):

> "In construing the language of the consent decree, I find that the votes cast by Gano Dunn were authorized by the powers conferred upon him by the consent decree and that his votes were well within the directions given to him by Columbia Oil. From this finding, it follows that the so-called application filed in this proceeding was not authorized by Panhandle Eastern or by any responsible body having control of said corporation."

The enforcement of decrees in equity is, by well settled principles, a matter ordinarily falling within the sound discretion of the Court which entered the decree.

The same contention was presented, by attorneys here purporting to represent the appellant, to the Chancellor of the Delaware State Chancery Court in connection with the proceeding brought subsequent to the annual meeting by Mckan pursuant to Section 31 of the Delaware Corporation Law (printed as Appendix C to this brief) for the purpose of reviewing the action of the meeting and determining what directors had been properly elected; and the same decision was reached by the State Chancery Court as had been previously reached by the Federal District Court. The Chancellor held that the action of the Mokan group purporting to amend the By-laws of Panhandle Eastern and enlarge the Board of Directors was void and without effect and that the nominees of Mokan as directors to fill the vacancies so created had not been elected directors (see decree of the Chancellor set out in Appendix A to this brief). The Chancellor, in his letter to counsel of June 11, 1940 (Appendix B), said:

> "Nor am I impressed by the contention that, even if Mr. Dunn's votes be considered as stock votes, they

> were void because he did not have the express directions of his principal with regard to certain matters that came before the meeting."

The principle of the Chancellor's ruling applies as much to the vote of Mr. Dunn opposing the resolution to intervene in this proceeding as to the resolution amending the By-laws in connection with which Mr. Dunn's vote was assailed on the ground that he did not have specific instructions and where the Chancellor sustained Mr. Dunn's vote as valid.

The soundness of the conclusion reached by these two courts, the Federal District Court below and the Delaware State Chancery Court, is apparent from a study of the language of the Consent Decree. Mr. Dunn's voting powers as set forth in that Decree are not limited to a mechanical compliance with detailed instructions from the beneficial owner, Columbia Oil; instead, Mr. Dunn, as Trustee, is permitted, in fact required, by the Decree "to vote said stock upon all other questions and matters" (*i. e.*, other than the election of directors) "on which the stock is entitled to vote, as directed by the beneficial owners thereof, except when such directions are inconsistent with the purposes of this decree" (R. 147). The grant of authority to him is in the broadest sense. The instructions given by Columbia Oil to Mr. Dunn in advance of the meeting (R. 503-9) were consonant with these broad provisions of the Decree; as pointed out by the District Court below (R. 523):

> "* * * Gano Dunn attended the annual meeting of March 11 girded with his own authority as Trustee, supplemented by all the directions from Columbia Oil that could have been anticipated in the normal course of human events."

In voting against the resolution providing for intervention in this action Mr. Dunn's vote was in no way "inconsistent with the purposes of this [Consent] Decree." The resolution demanded that the corporation institute a number of lawsuits, intervention in this proceeding being one of them, and then went on to name the attorneys to be employed for the purpose, being the attorneys for Mokan, and to provide further for the payment to these attorneys of "a reasonable compensation" (R. 461). Mr. Dunn was entitled to vote against the resolution if he believed, as he did, that this litigation would do no more than waste the corporate assets; for a previous application which had been filed in February, 1939, by Mokan asserting a derivative right as a stockholder on behalf of Panhandle Eastern, had been denied by the District Court on March 30, 1939 (R. 321), the Court in its opinion filed therewith (R. 314) assigning as one of the grounds for the denial that the application was not timely (R. 317-18). And the relief asked (R. 423-424) in the intervention application which has now been filed by these attorneys claiming to represent Panhandle Eastern, is comprised in the relief asked (R. 310) in the unsuccessful previous application by Mokan. Mr. Dunn, in voting the stock against proceeding with this new petition to intervene, was refusing to repeat, still a year later, the futile and costly procedure of renewing a claim which the Court had previously decided was unfounded. For this reason alone, and without regard to any other considerations, Mr. Dunn was justified in voting against the resolution.

The Mokan attorneys in their brief (pp. 29-31 thereof) attempt to pose a dilemma whereby Mr. Dunn could not vote at all upon the resolution introduced by Mokan, out of which this appeal arises. They assert that Mr. Dunn had

to vote, if at all, pursuant to instructions from Columbia Oil, and that since the resolution sought to compel Panhandle Eastern to bring intervention proceedings to assert claims against Columbia Oil, therefore such instructions by Columbia Oil were invalid. But the argument disregards the broad authority conferred upon Mr. Dunn as Trustee by the Consent Decree, as described in the preceding paragraph. He is empowered by the Decree (R. 146) "to exercise all the rights and privileges incidental to the absolute ownership" of the stock, and this includes the right to vote it. He is obliged to vote it as the beneficial owner, Columbia Oil, may direct, only in case such directions are not "inconsistent with the purposes of this decree" (R. 147); if they are inconsistent, he is not deprived of the right to vote, but may, under the general broad grant of authority to him above quoted, vote it as his conscience and judgment dictate. Therefore, if for purposes of argument it be assumed that Columbia Oil, because the intervention application contemplated an action against it, was disqualified from giving Mr. Dunn any directions to vote on the resolution, Mr. Dunn did not lose his right to vote according to his own lights. The reasons adduced in the preceding paragraph for voting against the intervention—lack of timeliness, the conclusiveness of a prior judgment, and the waste of corporate moneys in pursuing a procedure already disapproved by the Court—were ample to justify Mr. Dunn in voting as he did, as a matter of his own individual decision and irrespective of any directions, or lack of them, from Columbia Oil. There was no claim made at the stockholders' meeting that the proposed intervention action, which is the subject of this appeal, would ask relief against Mr. Dunn or challenge his

good faith in the performance of his trust. The statement in appellant's brief (p. 26) that the resolution to authorize this intervention "proposed an action against Gano Dunn, as trustee" is not correct and cannot be supported by the Record; the action contemplated by the proposed intervention application was described by its proponents to the stockholders' meeting only as an action against Columbia Oil (R. 462). In voting the stock of Panhandle Eastern against pursuing against Columbia Oil a second time what had previously been decided to be an unjustified suit, Mr. Dunn was clearly within his rights. His vote against the bringing of the present application to intervene was cast validly and the resolution was therefore validly defeated by the vote of the majority of the stock of Panhandle Eastern.

POINT IV

IF THE STOCKHOLDERS NOW PURPORTING TO SPEAK FOR PANHANDLE EASTERN FELT THAT THEY WERE UNJUSTLY TREATED BY THE DEFEAT OF THEIR RESOLUTION TO APPLY FOR INTERVENTION IN THIS CAUSE, THEIR PROPER COURSE WAS TO FILE A DERIVATIVE STOCKHOLDERS' ACTION IN BEHALF OF PANHANDLE EASTERN ASKING THAT IT BE ALLOWED TO INTERVENE, AND NOT TO ATTEMPT TO SEIZE CONTROL OF THAT CORPORATION AND ACT IN ITS NAME WITHOUT AUTHORITY FROM ITS BOARD OF DIRECTORS.

When a stockholder's rights are claimed to be infringed at a stockholders' meeting, he must seek relief through the orderly process of a court, instead of attempt-

ing to usurp control of corporate action through disorderly self-help.

Such a court process is provided by Section 31 of the Delaware Corporation Law (printed as Appendix C to this brief) for determining who were the directors validly elected at a stockholders' annual meeting. In the present case, the minority stockholders, now purporting to represent the appellant, availed themselves of this procedure after the annual meeting of March 11, 1940, and brought their action on March 13 in the Delaware State Chancery Court to determine who had been the directors duly elected at that meeting and whether the by-law which had been proposed by them increasing the board from 9 to 14 members had been legally adopted (R. 510). The Chancellor decided adversely to all their claims (see Appendices A and B). This finally settled the question as to who were the directors and officers legally elected.

Similarly, an orderly procedure existed for these same stockholders to determine whether the defeat at this stockholders' meeting of the resolution which they had offered in support of their application to intervene was voted down validly so as to preclude them from any further effort to enforce the claimed intervention right. Such a procedure would be a stockholders' derivative action, to be brought, with a due regard for all the requirements of actions of that nature, to be allowed to intervene in the right and on behalf of Panhandle Eastern. There was no need to resort to the disorderly proceeding, presented by the record in the present case, of claiming to have driven through resolutions ordering the Corporation itself to intervene.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED, OR, IF THE COURT CONSIDERS THE APPEAL, THE ORDER OF THE DISTRICT COURT APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

CLARENCE A. SOUTHERLAND,
DOUGLAS M. MOFFAT,
Attorneys for Appellee Columbia Gas & Electric Corporation.

Delaware Trust Building,
Wilmington, Delaware.

APPENDIX A

IN THE

COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MISSOURI-KANSAS PIPE LINE COMPANY,
Complainant,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, JOE D. CREVELING, LOUIS F. SPERRY, JOSEPH J. BODELL, DAVID BOYD-SMITH, HUBERT E. HOWARD, GEOFFREY MELLOR and WILLIAM C. TRINGHAM,
Respondents.

FINAL DECREE

AND NOW, TO-WIT, this 19th day of June, A. D. 1940, the above stated cause having come on to be heard before the Chancellor, upon testimony of witnesses and exhibits, and the said cause having been fully argued before the Chancellor,

IT IS ORDERED, ADJUDGED AND DECREED BY THE CHANCELLOR as follows:

(1) That the Bill of Complaint filed in the above-entitled cause shall be and the same is hereby dismissed.

(2) That at the annual meeting of stockholders of Panhandle Eastern Pipe Line Company held on March 11, 1940, each of the following persons was duly elected a director of said corporation, to serve for one year from date of said meeting, or until his successor should be elected and should qualify:

Joe D. Creveling
Joseph A. Bower
William J. Bulkley
A. Faison Dixon
Gano Dunn
William C. Maguire
Walter C. Mortland
Richard C. Paterson
Robert C. Winmill

(3) That none of the following persons, who were nominated for directors of Panhandle Eastern Pipe Line Company at said meeting, were duly or properly elected directors thereat:

Joseph J. Bodell
David Boyd-Smith
Hubert E. Howard
Geoffrey Mellor
William C. Tringham

(4) That at the date of the said annual meeting of stockholders, and on April 25, 1940, the date when the cause was heard, the following persons were the officers of the corporation:

Joe D. Creveling, President
Gerard J. Neuner, Vice-President in Charge of Operations
Robert D. Field, Vice-President
Leith V. Watkins, Secretary and Controller
Louis F. Sperry, Treasurer

(5) That although certain stockholders at said annual meeting of Panhandle Eastern Pipe Line Company purported to elect the following persons as officers of the corporation:

William G. Maguire, President
Gerard J. Neuner, Vice-President
Leith V. Watkins, Secretary
William C. Tringham, Treasurer

none of such persons were duly or properly elected officers by virtue of such action.

(6) That the action of certain stockholders at said annual meeting purporting to amend the by-laws of Panhandle Eastern Pipe Line Company was void and without effect and such by-laws were not modified in any respect whatsoever by any action taken at said meeting.

(7) That costs of the above-entitled cause shall be paid by the Complainant, Missouri-Kansas Pipe Line Company, within 30 days from date hereof, or attachment.

/s/ WM. WATSON HARRINGTON
Chancellor.

APPENDIX B

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

June 11th, 1940.

Hon. Hugh M. Morris,
Hon. Daniel O. Hastings,
Arthur T. Logan, Esq.,
Christopher L. Ward, Jr., Esq.,

Attorneys-at-law,

Wilmington, Delaware.

In re Missouri Kansas Pipe Line Co. vs. Panhandle Eastern Pipe Line Co., et al.,

Application to review an election of directors and officers under Sect. 31 of the Delaware Corporation Law.

Gentlemen:

After a thorough examination of the record of the proceedings of the stockholders' meeting in question, my conclusion is that the fair inference to be drawn therefrom is that the votes taken at that meeting were based on stock ownership, and not on the mere votes of the various persons present, regardless of the number of shares owned by them. It, therefore, necessarily follows that the corporate by-laws were not changed at that meeting and that the Board can only consist of nine members, and not of fourteen as is contended by Mr. Logan.

There may be cases where the facts and circumstances are such as to justify the conclusion that the right to a stock vote has been waived by a failure to expressly demand it on a particular vote; but, as I view it, this is not a case of that nature.

The provisions of the court order, under which title to a large block of stock was vested in Mr. Dunn, have an

important bearing on this conclusion; and this is particularly true as it is difficult to escape the conclusion that all of the provisions of this order were well known to the Mokan group, who claim that they ultimately controlled the meeting. From this aspect of the case, it is unnecessary for me to consider whether the by-laws could have been amended, without notice, or whether the fact that they were originally adopted by the incorporators, who were the only stockholders at that time, is an answer to any such contention.

There is no dispute as to the validity of the election of nine members of the Board, but there is a dispute as to the other five persons who, also, claim to be members of that Board. In view of the possible complications growing out of this contention, a speedy determination of this case is essential to efficient corporate management; and, because my conclusion is largely based on questions of fact, considered in connection with the pertinent statutory, charter and by-law provisions, it seems unnecessary to delay an announcement until I shall have had an opportunity to write an opinion.

Whatever foundation there may be for the charge that Mokan has been unfairly treated in the past by the corporation holding the controlling stock interest in Panhandle Eastern, I do not see how that question can be considered in this controversy. Nor am I impressed by the contention that, even if Mr. Dunn's votes be considered as stock votes, they were void because he did not have the express directions of his principal with regard to certain matters that came before the meeting.

Counsel for the respondents may present such an appropriate order as will carry out these conclusions.

Yours sincerely,

/s/ W. W. HARRINGTON

WWH.B

APPENDIX C

Delaware Corporation Law, Section 31

Sec. 31. *Election of Directors on Failure to Elect on Regular Day; Election Ordered by Chancellor; Contested Elections; Hearing Before Chancellor; Service*:—If the election for directors of any corporation shall not be held on the day designated by the by-laws, the directors shall cause the election to be held as soon thereafter as conveniently may be; no failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation, but the Chancellor may summarily order an election to be held upon the application of any stockholder, and at any such election the shares of stock represented at said meeting, either in person or by proxy, shall constitute a quorum for the purpose of such meeting, notwithstanding any provision of the by-laws of the corporation to the contrary.

Upon the application by any stockholders, the Chancellor shall have power to hear and determine the validity of any election of any director or officer of any corporation organized under this Chapter and the right of any person to hold such office, and in case any such office is claimed by more than one person may determine the person entitled thereto; and to that end make such order or decree in any such case as may be just and proper, with power to enforce the production of any books, papers and records of the corporation relating to the issue; and in case it should be determined that no valid election of the corporation has been held, the Chancellor shall have power to order an election to be held in accordance with the provisions of the first paragraph of this Section. In any such application service of copies of such petition upon the corporate resident agent of the corporation shall be deemed to be service upon the corporation and upon the person whose title to office is con

tested and upon the person, if any, claiming such office; and it shall be the duty of such resident agent to forward immediately a copy of said petition so delivered to him, or it, to the corporation and to the person whose title to office is contested and to the person, if any, claiming such office, in a post-paid, sealed registered letter addressed to such corporation or such person at his or its last known post-office address; and the Chancellor may make such further or other order respecting notice of such application as he may deem proper under the circumstances.

The Chancellor in any proceeding instituted under this Section shall have power to determine the right and power of persons claiming to own stock, to vote at any meeting of the stockholders authorized by or referred to in this Section.

The Chancellor shall have power to appoint a Master to hold any election provided for in this Section under such orders and powers as he shall deem proper; and he shall also have power to punish any officer or director for contempt, in case of disobedience of any order made by the Chancellor and may, in case of disobedience by any such corporation of any order made by the Chancellor, in his discretion, enter a decree against such corporation for a penalty in a sum not exceeding the sum of Five Thousand dollars ($5,000.00).